IN THE

Supreme Court of the United States

OCTOBER TERM—1949.

No. 42

UNITED STATES OF AMERICA,

Petitioner,

—against—

LILLIAN SPELAR, as Administratrix of the Estate of MARK SPELAR, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

GERALD F. FINLEY
ARNOLD B. ELKIND
Counsel for Respondent
545 Fifth Avenue
New York 17, N. Y.

September 12, 1949

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Opinions Below

The United States District Court for the Eastern District of New York dismissed the complaint with an opinion (R. 10-15) reported at 75 F. Supp. 967.

The United States Court of Appeals for the Second Circuit unanimously reversed the order of dismissal and the opinion (R. 19-24) is reported at 171 F. (2d) 208.

Jurisdiction

The petition for a writ of certiorari was filed by the Petitioner on March 8, 1949, pursuant to 28 U. S. C. A. 1254 (1), addressed to the judgment of the Court of Appeals entered on December 8, 1948 (R. 25). Certiorari was granted on April 18, 1949, 336 U. S. 950.

Question Presented

"Does the exclusion from the coverage of the Federal Tort Claims Act of 'any claim arising in a foreign country,' 28 [U. S. C. A., Section 943(k), revised Title 28, United States Code, Section 2680(k), prevent recovery from the United States of America for wrongful death occurring on a Government airfield in Newfoundland in an area covered by a 99 year lease and Executive Agreement as a part of the famous 'destroyer deal' between Great Britain and the United States of March 27, 1941?" [1]

Statutes Involved

The pertinent portion of the Federal Tort Claims Act, 60 Stat. 842, 843, 28 U. S. C. 931 *et seq.* (1946), provided at the time this action was commenced:

> "Subject to the provisions of this chapter, the United States District Court for the district wherein the plaintiff is resident, or wherein the act or omission complained of occurred, including the United States District Courts for the Territories *and possessions of the United States*, • • • shall have exclusive jurisdiction • • • on any claim against the United States, for money only on account of • • • personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his • • • employment, under circumstances where the United States if a private person would be liable to the claimant for such • • • death in accordance

[1] Opinion of Court of Appeals, 171 F. 2d 208

with the law of the place where the act or omission occurred.[2]

• • • The provisions • • • shall not apply to • • • (k) any claim arising in a foreign country." (Italics and deletions ours.)[3]

Statement

On October 3, 1946 a plane of the American Overseas Airlines, on a flight from LaGuardia Field in New York to Shannon, Ireland, crashed on a take-off from Harmon Field killing all of the crew and passengers on board. Harmon Field and the surrounding area in Stephenville, Newfoundland was and is possessed by the United States under an Executive Agreement and 99 year lease. An immediate investigation of the accident was conducted at the scene by the Civil Aeronautics Board[4] in accordance with Title 7 of the Civil Aeronautics Act of 1938 as amended.[5]

The Civil Aeronautics Board thereafter held a regular hearing in New York City on October 11, 1946, presided over by one of their officers, and which was attended by the Chief Inspector of Accidents, Royal Canadian Air Force, official representative of the Newfoundland Government, and by a member of the Civil Aeronautics Department of

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2 Since the commencement of this action the Tort Claims Act has been revised and amended as part of the 1948 Revision of the Judicial Code, and the pertinent sections of the Act in the Revision are as follows: jurisdiction of the courts is now 28 U. S. C. 1346(b); venue for Tort Claim actions is now 28 U. S. C. 1402(b); Tort Claims procedure generally is 28 U. S. C. 2671 to 2680 inclusive, and the exceptions to the coverage of the provisions of the Tort Claims Act are found in 28 U. S. C. 2680.

3 There has been no change in the Revision with respect to exception (k) which excludes "any claim arising in a foreign country."

4 Civil Aeronautics Board File [illegible]-46 Docket No. SA-125

5 49 U. S. C. 581, 582

the Government of Newfoundland as an observer. At this hearing some 17 witnesses gave testimony under oath and some 34 exhibits were received in evidence.

Lillian Spelar, the Respondent, is the Administratrix of the Estate of Mark Spelar, the Flight Engineer of the crashed plane. She was granted Letters of Administration by the Surrogate's Court of Queens County, New York, where she and the decedent resided (R. 5, 6).

In April of 1947 the Respondent commenced an action in the Eastern District of New York pursuant to the Federal Tort Claims Act, alleging that the death of her husband was caused by the negligence of the Government in the supervision and maintenance of Harmon Field (R. 4, 5). The Petitioner raised the question of whether the area where the accident occurred was a foreign country by a motion to dismiss, upon the ground that the claim arose in a foreign country (R. 8).

The District Court granted the motion on the ground that the Federal Tort Claims Act gave no clear and specific clue concerning the geographical area to which Congress intended the legislation to be applicable, and that therefore there was no recourse except to apply the familiar principle that a Congressional waiver of sovereign immunity is to be narrowly construed, and that under any narrow construction of the statute the expression "foreign country" certainly applies to Newfoundland, and even to areas within it over which the United States exercises many, but not all, of the powers of a sovereign (R. 13, 14).

The Court of Appeals unanimously reversed on December 8, 1948, which was just two days after the announcement of the opinion of this Court in *Dalehite Brown & Co.* v.

Council, 335 U. S. 377, rejecting the doctrine of "niggardly construction" to the provisions of the Tort Claims Act and pointing out moreover that the statutory exception referring to a "foreign country" is sufficiently precise and explicit so that even without the *Council* precedent the widow's claim must be held included in the coverage of the Act (R. 22, 23).

Summary of Respondent's Argument

There is no longer any room in our present conception of public morality regarding Governmental responsibility to persons damaged by the Government's torts, for the doctrine that a waiver of the sovereign immunity to suit must be strictly construed.

The Executive Agreement and 99 year lease between the United States and Great Britain of March 27, 1941 (55 Stat. Part 2, 1560-1594, House Document #158, 77th Congress) conferred territorial possession and control over the area where this tort was committed, including legislative and jurisprudential dominion. The presumption of territoriality resorted to by this Court in *Foley Brothers* v. *Filardo*, 336 U. S. 281, 285, has no application here because the Tort Claims Act prescribes its geographical coverage with sufficient precision to bar reliance on a canon.

The leased area in Newfoundland could never be judicially construed to be a "foreign country" without doing violence to the long accepted understanding of the term, to wit: that a foreign country is one exclusively subject to the sovereignty of a foreign nation.

There is no anomaly in the Respondent's resort to the death statute of Newfoundland. There is no discernible legislative purpose to exclude all tort claims based on foreign law and, even if there were, the Death Statute upon which

the Respondent relies is by construction that adopted by Congress for the leased areas.

Governmental agencies have, with considerable uniformity, considered the leased areas to be subject to the legislative, administrative and judicial control of the United States and the Petitioner cannot now be heard to assert that they are foreign countries. There are no reasons of policy to justify a deviation from the Congressional expression of intended generosity toward tort claimants.

The Petitioner seeks a construction of legislative intent whereby given areas, possessions of the United States for the purpose of measuring the responsibility of private individuals, are nevertheless foreign countries where its responsibilities as a sovereign are involved. Such a mean and anomalous intention should not be attributed to Congress without compelling reasons of policy to rationalize the distinction.

ARGUMENT

POINT I

The Federal Tort Claims Act is remedial in nature and should not be stultifyingly construed.

If canons of constructions need be resorted to to determine whether or not Congress intended to exclude claims arising in the leased areas from the coverage of the Tort Claims Act when it used the term "claims arising in a foreign country," then immediate disposition must be made of that outworn, anachronistic and archaic hoodwink that a waiver of sovereign immunity from suit is to be strictly construed. The purpose of the Tort Claims Act was explained to the Judiciary Committee of the House of Representatives by Francis M. Shea, Assistant Attorney General in charge of

the Claims Division, at the 77th Congress, 2nd Session, when hearings were being conducted on certain proposed changes.

Mr. Shea explained (page 29) that the bill was a necessary step in the gradual disappearance of the sovereign's archaic immunity from responsibility for its agents' conduct. He said that in an era of steadily growing Government activity the absence of a satisfactory procedure for redressing wrongs is a great defect in our social policy and that the bill would supply a well-defined, continually operating machinery to redress tortious wrongs arising out of Government activity in place of existing procedures which are admittedly inadequate and burdensome to the Government and the claimant. He quoted with approval the words of President Lincoln to the effect that it is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.

The remedial purposes of the Tort Claims Act is scarcely open to question and, in fact, this Court very recently in *Larson, as War Assets Administrator, etc.* v. *Domestic and Foreign Commerce Corporation*, 338 U. S. (1949), promised to give hospitable scope to the trend of Congress to permit such suits to be maintained against the sovereign.*

It is now generally recognized that the Federal Tort Claims Act has restored to the individual citizen that equality as a litigant with respect to some private rights with his Government which should have been an integral part of our conception of public morality regarding Governmental responsibility at the time of our Government's origin.

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2. Hearings before the Committee on the Judiciary, House of Representatives, 77th Congress, 2d Session, on H. R. 5373 and H. R. 6463.

* See *Keifer & Keifer v. United States*, 306 U. S. 381 (1939).

Full scope should be given to the remedial purpose of the legislation, and in construing whether it was intended to include the leased bases in the coverage of the Act it should be borne in mind that the language selected to demarcate the area of its liability was that chosen by the tortfeasor. Were there any doubt created by the text chosen, that doubt should be resolved against the drafter and in favor of the injured party. We contend, however, that Congress intended that torts committed by the Petitioner in the leased bases should be suable under the Act.

The Court should not adopt the fiction that our leased possessions are foreign countries in order to deprive tort claimants of their day in court with their sovereign unless sound reasons of policy would dictate that result.

POINT II

Congress did not intend to exclude our leased possessions when it selected the term "foreign countries" as the geographical exclusion for the Tort Claims Act.

The place where this action arose was obtained from Great Britain under the identical Executive Agreement of March 27, 1941 (55 Stat. Part 2, 1560-1594) and 99 year lease as that considered by this Court in *Vermilyea Brown Co. v. Connell*, 335 U. S. 377, in which this Court concluded that these areas were possessions within the amendment of the Fair Labor Standards Act.[2]

The Executive Agreement of March 27, 1941 was already important history by 1946 when the Congress enacted the Federal Tort Claims Act and the provisions of the Executive Agreement may therefore be examined to determine whether they were such as to place Congress on notice that if it

[2] 29 U. S. C. A. 201 et seq.

selected the term "foreign countries" to mark the geographical exclusion of the coverage of the Act, it would not thereby exclude claims arising in the areas acquired by that famous transaction.

Article I (1) gave to the United States all the rights, power and authority within the leased area which are necessary for the establishment, use, operation, and defense thereof, or appropriate for their control * * *. In contradistinction with this broad general grant of power and authority which we argue includes legislative and jurisprudential control is the more limited grant with respect to territorial waters and adjacent air space.[10]

It is to be particularly observed that the covenant of the United States contained in Article I (3) and (4) of the Executive Agreement not to use the powers granted unreasonably, etc. and to consult with the government of the United Kingdom in the practical application of the rights granted is made only with respect to powers granted *outside* the leased areas. The rights, authority and power of the United States are supreme and unfettered *in* the leased areas except for several minor reservations of right in the Executive Agreement. It cannot be argued nor does petitioner suggest that any right reserved to Great Britain in the Executive Agreement could be construed to reserve ultimate legislative or jurisprudential control in the leased areas from the United States.

Many other of the important *indicia* of sovereignty were granted to the United States. So long as the United States continues to use the leased area it has exclusive jurisdiction

[10] Article I (1) in its entirety reads as follows:

"The United States shall have all the rights, powers and authority within the leased areas which are necessary for the establishment, use, operation and defense thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the leased areas, which are necessary to provide access to and defense of the leased areas or appropriate for control thereof."

over public health, safety, law and order as well as defense.[11]

That the United States has the right under the Agreement to establish courts in the leased area is made crystal clear by a reference to such a court in Article IV (4) which provides that British subjects may be tried for certain offenses "by a United States court sitting in a leased area in the territory."[12]

By Article VI no arrest may be made and no process, civil or criminal, may be served within the leased area except with the permission of a representative of the United States, and process is defined by sub-division (3) of Article VI as including "any process by way of summons, subpoena, warrant, writ or other judicial document for securing the attendance of a witness, or for the production of any documents or exhibits, required in any proceedings, civil or criminal."

The separation of executive supremacy between the leased areas and the balance of the territory in which the leased area is located is emphasized by Article VIII, which provides for reciprocity in connection with a surrender of offenders.

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11 Article III states:

> "The United States shall be under no obligation to improve the leased areas or any part thereof for use as naval or air bases, or to exercise any right, power or authority granted in respect of the leased areas, or to maintain forces therein, or to provide for the defence thereof, but if and so long as any leased area, or any part thereof, is not used by the United States for the purposes in this agreement set forth, the Government of the United Kingdom or the Government of the Territory may take such steps therein as shall be agreed with the United States to be desirable for the maintenance of public health, safety, law and order and, if necessary, for defence." (Italics supplied.)

12 Compare this with the jurisdictional provision of the Tort Claims Act passed five years later conferring jurisdiction on courts "including the United States District Courts for the Territories and possessions of the United States." 28 U. S. C. (Supp. V) 1346.

The reservations of authority to Great Britain serve only to emphasize the broad extent and general character of the sovereign control granted to the United States by the Agreement. For example, it was necessary to provide in the Agreement that British commercial vessels may use the leased areas on the same terms and conditions as United States commercial vessels (Article XI (3)); and that the leased area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the leased areas (Article XI (4)), and that commercial aircraft will not be authorized to operate from any of the bases except under certain conditions (Article XI (5)).

By Article XIII the immigration laws of the territory are made inapplicable as a practical matter, and by Article XIV tariffs on trade with the leased areas are as a practical matter prohibited.

The United States has the right to establish its Post Office in the leased areas (Article XVI) and United States nationals are granted an exemption from the tax laws in the balance of the territory (Article XVII).

The most important restrictions imposed by the Agreement on the sovereignty of the United States over the leased area appear to be the restrictions of Article XVIII which prohibit the establishment of businesses and commercial and professional activity. These restrictions were of course, calculated to maintain the character of the leased areas as defense bases and would seem completely immaterial to resolving the question of whether Congress believed the leased areas to be foreign countries when it used that term in drafting the geographical limitations in coverage of the Federal Tort Claims Act.

Article XXIV makes it clear that the Executive Agreement and leases accomplished a transfer of possession to the United States.

Finally, however, there is this admission of the legislative supremacy of the United States in the leased area: "During the continuance of any lease no laws of the territory which would derogate from or prejudice any of the rights conferred on the United States by the lease or by this agreement shall be applicable within the leased area save with the concurrence of the United States."[11]

The Executive Agreement containing these important grants of power, authority and jurisdiction, was signed on March 27, 1941 and transmitted to the Congress by a note of the same date, was referred to the Committee of the Whole House on the State of the Union and was ordered to be printed.[12] The leases implementing the transfer of possession were signed and delivered.

The terms and conditions of the Executive Agreement received more than usual publicity and scrutiny both in the press and in legislative and political quarters because of the question of whether or not the transaction with the United Kingdom could be validly made without treaty and the ratification of the Senate. The United States did in fact, without delay, go into possession and occupancy of the leased areas and that fact of occupancy and possession was not and has not been challenged by anyone.

The cession of the leased area to the United States was a long established fact by 1946 when Congress passed the Tort Claims Act. It would seem very obvious that had Con-

[11] Article XXIX reads in its entirety as follows:

"The United States and the Government of the Territory respectively will do all in their power to assist each other in giving full effect to the provisions of this agreement according to its tenor and will take all appropriate steps to that end. During the continuance of any lease no laws of the territory which would derogate from or prejudice any of the rights conferred on the United States by the lease or by this agreement shall be applicable within the leased area save with the concurrence of the United States."

gress intended to exclude the defense base areas from the coverage of the Foot Claims Act it would have selected almost any term other than "foreign countries" to mark the geographical areas beyond which the Act was not to apply. In ordinary parlance, if not indeed as a matter of judicial interpretation, the term "foreign country" is thought of as meaning an area exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States.[15] *Cf. De Lima* v. *Bidwell*, 182 U. S. 1, 180 and *Fourteen Diamond Rings* v. *U. S.*, 183 U. S. 176.

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15 In choosing the term "foreign country", the framers of the legislation must have intended to embrace exclusively under the sovereignty of a country other than the United States. This Court in tariff cases had made the same distinction on the basis of sovereignty. After the ratification of the peace treaty between the United States and Spain, Puerto Rico and the Philippines ceased to be "foreign countries" under the tariff laws. The Supreme Court so held in *De Lima* v. *Bidwell*, 182 U. S. 1 and *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176. In the *De Lima* case the Court said (p. 180):

> "Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a 'foreign country' at the time the sugars were shipped, since the tariff act of July 24, 1897, c. 11, 30 Stat. 151, commonly known as the Dingley act, declares that there shall be levied, collected and paid upon all articles imported from foreign countries certain duties thereon specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of the United States. The Boot Elize, 3 Cranch 4; Talbot v. United States, 1 Story, 1; The Ship Adventure, 1 Brock. 235, 241. The status of Porto Rico was this: The Island had been for some months under military occupation by the United States as a conquered country when, by the second article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case required, many facts in these facts, and the question were [illegible] sovereignty which had been ceded to us [illegible] and the island occupied [illegible] by Spain or any other power, [illegible] it would seem that

The analogy of the situation in the *Fourteen Diamond Rings* case (*supra*) and the instant case is very strong, except that in the case of the Philippines acquisition was by instrument denominated as a treaty (even though the United States agreed to pay to Spain the sum of $20,000,000.00 therefor within three months) and in the case of the Newfoundland base acquisition was by an instrument identified as an Executive Agreement.

Quite aside from the political question of whether or not the United States has "sovereignty" over the leased area it is, as the Court of Appeals below thought, on the whole fantastic to believe that Congress considered the leased areas to be foreign countries within the meaning of a local

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fee simple to a purchaser, who had accepted the deed, gone into possession, paid taxes and made improvements without let or hindrance from his vendor. But it is earnestly insisted by the Government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a 'foreign country' under the tariff laws, until Congress has embraced it within the general revenue system."

In the case of *Fourteen Diamond Rings v. United States* (*supra*), the court said, at page 178:

"The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States by their former master were no longer under the sovereignty of any foreign nation."

The Government had sought, in the *Fourteen Diamond Rings* case, to distinguish it from the *De Lima* case by reason of the fact that after the treaty with Spain had been ratified Congress specifically resolved that "it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States" (Congressional Record, 55th Congress, Third Session, Volume 32, page 1847).

The court held that even though the inhabitants of the Philippines were not citizens and even though there was this specific Congressional declaration to the effect that the possession of the Philippines was on a temporary basis, the Philippine Islands were not a foreign country within the meaning of the tariff law.

statute affecting the relation of this government and private persons; nor can it be escaped that the cession of the leased areas was actually made—both grant and occupancy—long prior to the enactment of the Tort Claims Act.

POINT III

There has been a Congressional expression of intent that the Federal Tort Claims Act should apply to the leased areas.

The Government seems to argue from *Foley Brothers* v. *Filardo*, 336 U. S. 281, 285, that the Court should resort to a presumption of territoriality in connection with the Federal Tort Claims Act. As this Court said there, such an approach is only valid where there is unexpressed Congressional intent. In the instant case Congress has almost as a textual matter expressed an intent that the Tort Claims Act should apply within the territorial limits of the United States, in all of the Territories and possessions of the United States including, of course, its leased areas, and in fact everywhere except "that it shall not apply to any claim arising in a foreign country." The choice of language is far more eloquent than the silence on territorial application which was the nucleus for the principle in *Foley Brothers* v. *Filardo*, *supra*.

Moreover, evidence that the leased areas were specifically in contemplation of Congress in the enactment of the Tort Claims Act is found in the original jurisdictional provisions thereof, which provided that district courts in the Territories and possessions of the United States were appropriate forums for the institution of these suits.

The opinion of the Court of Appeals (R. 21) aptly points out, that although the district courts are spelled out in the statute (Title 28, U. S. Code 1346(b)) to designate those

of Alaska, the Canal Zone and the Virgin Islands, the revision obviously was not intended to limit the coverage of the Act and therefore "the reference to the original form is of importance as indicating a Congressional recognition of claims in the 'possessions' of the United States."

It does not serve to deny that recognition by insisting that no courts have in fact been established in the leased areas. The fact of the matter is that such courts may be established in the leased areas at any time (see Article IV of the Executive Agreement with Great Britain).[16]

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16 Congressional reports recognize that civil courts have not been established in the leased areas only because of practical difficulties. The report of the Senate Committee on Naval Affairs (Senate Report #26, January 28, 1943, U. S. Code Congressional Service, pp. 2 to 8) recommended favorable consideration of a bill which extended Naval courts martial to certain persons in leased areas outside the continental limits of the United States. This bill became law on March 22, 1943 (34 U. S. C. A. 1201). The report pointed out that a similar law had already been passed for civilians accompanying the armed forces without the territorial jurisdiction of the United States (Article 2(d) of the Articles of War, 41 Stat. 787, 10 U. S. C. 1473 (d).). The report points out (page 8):

> "The President has stated that civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States.
>
> "There are many practical difficulties connected with the administration of justice in the outlying islands through the civil courts, when such islands are occupied in time of war or national emergency almost solely by the armed forces and persons accompanying or serving them.
>
> It is highly desirable to provide during such time for the administration of justice in these areas in the cases of civilians offending against naval laws, and also to have civilians employed in adjacent areas by the Army and Navy, respectively, or by their contractors, amenable to similar laws, jurisdiction, and courts."

POINT IV

There is no discernible legislative purpose to exclude all claims based on foreign law.

The Petitioner seeks, by a painstaking review of the legislative history of the various Tort Claims Acts, to demonstrate that Congress had in mind an intention not to make claims against the United States justiciable under foreign law. This review, while of unquestioned thoroughness, is of little assistance to the Petitioner's thesis. It is true that at the time when the emphasis on tort liability was shifted in the drafts to local law, Mr. Shea, an Assistant Attorney General in charge of the Claims Division said (Hearings before the Committee of the Judiciary, House of Representatives, 77th Congress, 2nd Session, on H. R. 5373 and H. R. 5463 — page 35) that claims arising in a foreign country have been exempted from the bill whether or not the claimant is an alien. He added that it was wise because of the emphasis on local law to restrict coverage to claims arising in this country. The lack of geographical significance of his comment as it bears on the present case is underscored by the fact that what Mr. Shea said was immediately interpreted by the Committee to mean that any representative of the United States who committed a tort in a foreign country such as England could not be reached under the Act."

17. Immediately after Mr. Shea's explanation of the change, Representative Robsion said:

"As I understand, that any representative of the United States who committed a tort in England or some other country could not be reached under this?"

Mr. Shea: "That is right. . . ."

The Petitioner has omitted from the legislative history the one occasion on which the geographical extensity of the Act's coverage was specifically and directly discussed. At a meeting of the sub-committee of the Senate Committee on the Judiciary which was considering a predecessor Tort Claims Act, S. 2690, 76th Congress, 3rd Session, J. J. Keegan, a member of the U. S. Employees Compensation Commission, testified. The exclusion at that time read as follows:

> "Any claim arising in a foreign country in behalf of an alien."

Mr. Keegan said (page 55):

> "The exceptions overlook an important provision. There is no geographical limitation as to the application of the measure. The absence of such a provision would make the bill very difficult of administration beyond the geographical limits of the United States and its possessions."

Mr. Keegan thereupon offered an amendment, which was duly printed (page 65), reading:

> "This Act shall be applicable only to damage or injury occurring within the geographical limits of the United States, Alaska, Hawaii, Puerto Rico, or the Canal Zone."

The amendment was not adopted either in terms or in substance.

It is therefore to be observed that an amendment was offered which would have given the very result contended for here by the Government.

> That amendment was rejected, indicating an intention on the part of Congress to extend its tort liability beyond the geographical limits of the United States, Alaska, Hawaii, Puerto Rico and the Canal Zone and, in fact, to include all territories except foreign countries.

Nor can it be said that Congress was at a loss to describe the leased areas in terms other than as "foreign countries." The Tort Claims Act was passed by the 79th Congress. The first session of the 77th Congress passed, and the 78th Congress amended, the Foreign Claims Act, which contained the appropriate language for references to the leased areas. After a predecessor Congress had passed one law, namely: the Foreign Claims Act, which applied to a "foreign country, including places located therein which are under the temporary or permanent jurisdiction of the United States" (55 Stat. 880, amended 57 Stat. 66, 31 U. S. C. 224(d)) would it not be entirely reasonable, if Congress had intended to exclude claims arising in the leased areas, to state "the provisions of this title shall not apply to any claim arising in a foreign country, including places located therein which are under the temporary jurisdiction of the United States"?

The changes made by the revision of the Judicial Code in 1948 may not be considered as any evidence of original Congressional intent. In fact, the decision of the District Court on February 11, 1948 in this very case (R. 10) antedated the adoption of the revision.[18]

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18 Frank J. Parker, Chief Assistant United States Attorney in the Eastern District, who appeared for the Petitioner here in the District Court and in the Court of Appeals, was a member of the revision staff representing the combined editorial staffs of the Edward Thompson Company and West Publishing Company, which actually drafted the revision to Title 28. The revision of Title 28 did not pass Congress until June 12, 1948, which was five months after the *Spelar* case was decided and more than a year after the action was commenced.

POINT V

The Petitioner has consented to the continued application of the Newfoundland death statute in the leased area and there is no anomaly in having its liability as a tortfeasor adjudicated thereunder.

The Tort Claims Act provides that the liability of the United States to tort claimants for damage, loss, injury or death shall be governed by the "law of the place where the act or omission occurred."

The Complaint filed by the Respondent alleged and offered to prove the death statute of Newfoundland (R. 6), which provides:

> "1. Whensoever the death of a person shall be caused by any wrongful act, neglect, or default, and the act, neglect, or default, such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.
>
> 2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased."

It will be observed that the death statute is the Lord Campbell's Act which preserves actions for wrongful death in many, if not the majority, of the states of the United States.

Under the Executive Agreement of March 27, 1941, which clearly contemplated general legislative control over the leased area to the United States, the parties also agreed in Article XXIX:

> "During the continuance of any lease no laws of the Territory which would derogate from, or prejudice any of the rights conferred on the United States by the lease or by this agreement, shall be applicable within the leased area, save with the concurrence of the United States."

No wrongful death statute has ever been enacted by the United States to cover the leased areas, although the problem of providing machinery for compensating injuries in these areas was considered by Congress, and the power to legislate on that subject was exercised as early as 1942, when the provisions of the Longshoremen's and Harbor Workers Compensation Act was made applicable to civilian employees in the leased areas.[19]

Since the death statute of Newfoundland is in line with the policy of many of the states on wrongful death and since Congress has the power to pass some other death statute or even to repeal the Newfoundland death statute in the leased area, it would seem that the United States has concurred in the continuance of the Newfoundland death statute for the leased areas. It appears to be one of the established principles of international law moreover that when legislative sovereignty is changed, as it was clearly changed in this instance, the private rights of in-

19 Defense Base Act, 56 Stat. 1028; 42 U. S. C. 1651 (1942). It is interesting to note that Congress itself recognized, in connection with the passage of this Act, that it had the supreme power to legislate in the leased areas, for it made the liability of any employer under the Defense Base Act exclusive of all other liability . . . under the Workmen's Compensation Law of any state, territory or other [illegible] applied.

inhabitants are unaffected by the change and existing private law, as opposed to public law, continues until altered by the new sovereignty[20] (or sovereignties if the Petitioner chooses).

Even though the unsupported assumption be made that Congress had in mind that tort liability of the United States should not be determined by the laws of a foreign country, the death statute under which the claimant is suing here is in truth and fact a death statute in operation by the leave and sufferance of the United States. In that sense, the death statute is not the death statute of a foreign country but is rather the death statute of the Petitioner. The death statute, rather than being that of Newfoundland is the death statute of the United States for that particular leased area.

POINT VI

The Petitioner has in fact asserted legislative, administrative and judicial control over the leased areas and cannot now be heard to assert that they are foreign countries.

A

Legislative

As we have seen, Congress has legislated in the leased areas. The Defense Base Act, passed during the 1st Session of the 77th Congress and amended the following session, specifically applies to "any military, air or naval base

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20 *United States* v. *O'Donnell*, 58 S. Ct. 708, 303 U. S. 501; *Shapleigh* v. *Mier*, 57 S. Ct. 261, 229 U. S. 468, 113 A. L. R. 253; *Flensburger Dampfercompagnie* v. *United States*, 59 F. (2d) 464, cert. den.; *United States* v. *Flensburger Dampfercompagnie*, 52 S. Ct. 645, 286 U. S. 564

acquired after January 1, 1940 by the United States from any foreign country" (55 Stat. 622, amended 56 Stat. 1035; 42 U. S. C. 1651).

The War Damage Act, passed by the 2nd Session of the 77th Congress applies to "such property situated in the United States, including the several states and the District of Columbia, the Philippine Islands, the Canal Zone, the territories and possessions of the United States, and any such other places as may be determined by the President to be under the domination and control of the United States" (56 Stat. 174, 176; 15 U. S. C. 606(b)(2)).

The Foreign Claims Act, passed by the 1st Session of the 77th Congress and amended during the 78th Congress, applies to a "foreign country, including places located therein which are under the temporary or permanent jurisdiction of the United States" (55 Stat. 880, amended 57 Stat. 66; 31 U. S. C. 224(d)).

The Fair Labor Standards Act of 1938, 29 U. S. C. A. 201 *et seq.* was judicially declared to apply in the leased areas although passed prior to the acquisition of the bases and although the geographical area for coverage was considerably more limited, the language being to "employees engaged in interstate commerce in any state of the United States or the District of Columbia, or any territory or possession of the United States" (29 U. S. C. A. 203(b) and (c)).

Similar Brown v. Connell, (supra).

B

Administrative

The statutes above referred to have so important instances required the exercise of administrative functions in the leased areas, but we single out the investigation of the Civil Aeronautics Board of the very accident in which the Respondent's husband lost his life as representing the common acceptance by the Petitioner of the fact that the leased areas are not foreign countries. Title 7 of the Civil Aeronautics Act (49 U. S. C. A. 581, 582) is silent as to the geographical extent of the jurisdiction of the Civil Aeronautics Board. The statute imposes a duty on the Civil Aeronautics Board to "investigate such accidents and report the facts, conditions, and circumstances relating to each accident, and the probable cause thereof" (49 U. S. C. 582(2)).

Without any hesitation or requests for advisory opinions, the Civil Aeronautics Board properly, we believe, immediately put its machinery into motion and investigated the crash in which the Respondent's husband was killed and marshalled the evidence, including exhibits, and this was obviously done with the complete knowledge of the Newfoundland Government.

C

Judicial

As we have previously seen, the Executive Agreement contemplated the possibility of the establishment of a United States District Court in the leased area. The record shows that such civil courts were not established only because of practical difficulties, since the leased areas were occupied

in time of war and national emergency almost entirely by the armed forces and persons accompanying them or serving them (Senate Report 2230, January 28, 1948, 1 U. S. Code Congressional Service p. 811). The judicial system of courts martial was therefore made applicable in the leased areas.

POINT VII

There are no reasons of policy to warrant the exclusion of the leased areas from the coverage of the Tort Claims Act.

In *Vermilya Brown* v. *Connell*, *supra*, and *Foley Brothers* v. *Filardo*, *supra*, the Court was construing the geographical extent of statutes having to do with labor conditions and there were therefore present in those cases problems of high international, and critical domestic policy.

In the present case the only persons even remotely involved are persons receiving injury in the leased areas at the hands of the Petitioner. To hold that the leased areas are covered by the Act would be in direct line with the benevolent purposes of the legislation without any concomitant difficulty to the Petitioner. The defense of an action arising in a leased area imposes no more difficulty upon the United States than would the defense of an action in any other part of the United States. The means of investigation and report are at the disposal of the Petitioner. The statutes which might affect the Petitioner's liability, such as the death statute, are subject to its control. The number of people and type of people who might be in the leased areas are, as a practical matter, under its control. Why then should the Court indulge in the fiction that these leased areas are foreign countries so as to deprive tort claimants of their day in court? We cannot see that any

useful purpose will be served to the Petitioner or its information relations by informing the rest of the world that although we consider the leased areas our possessions insofar as the responsibilities of private individuals are concerned, they nevertheless remain foreign countries where the Petitioner's responsibilities as a sovereign become involved.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

GERALD F. FINLEY
ARNOLD B. ELKIND
Counsel for Respondent
545 Fifth Avenue
New York 17, N. Y.

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